A consideration of the UK Government's proposals for business improvement districts in England: issues and uncertainties

Martin Blackwell
School of Architecture and the Built Environment

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Abstract

Purpose of this paper

To provide a critical appraisal of the UK Government's proposals for the introduction of Business Improvement Districts (BIDs) into England considering Statute and case law against the proposed regulations, whilst drawing upon the experience of BID models in North America.

Design/methodology/approach

The paper analyses the proposed regulations against the existing Statute and common law position in England.

Findings

The regulations will not levy *all* hereditaments as stated. The voting and taxation provisions are not defined and transparent in connection with those paying less than full rates. Implications of the House of Lords decision in *Edison* appear to have been overlooked in the drafting.

Research limitations/Implications

The paper is specific to the Draft Business Improvement Districts (England) Regulations 2004. The paper identifies key issues for those involved in the local economy and property management in England. It is relevant across jurisdictions to those considering proposals for the implementation of BID schemes.

Practical Implications

The paper is relevant to those occupiers and owners, and their advisors, who have an interest in property that is, or may be, included in a BID area.

What is original/value of the paper

The paper considers in an original manner the detailed proposals for the implementation of BIDs in England. It researches a number of areas of concern to those seeking to implement or pay a BID levy. It identifies a number of areas in which the regulations will not achieve the stated aims. Weaknesses in the voting and taxation provisions are identified.

Paper Type

Research

Key Words

Business Improvement Districts England, Rating, Local Taxation

Introduction

Central Government has consulted on proposals for the implementation of Business Improvement Districts (BIDs) in England. This paper provides a critical response to aspects of the proposed regulations of interest to those in the local economy. In essence a BID, following the American model, may be seen as the most focused initiative yet to bringing a range of stated benefits, with consequential financial burdens, to a particular local economy. The origin and evolution of BIDs is discussed by Levy (2001).

It is the apparent success of BIDs in the American context (Mitchell 2001) that has prompted their introduction to England. There are several fundamental differences between the operation of the two. In America, BIDs are a private sector led initiative often starting in a voluntary manner, the levy being charged on property owners and not property occupiers. The proposed regulations for England will impose a compulsory levy and a remedy for non-payment should a BID be voted in. The occupiers of property in England will be identified by reference to liability to non-domestic rating, the fundamental unit of which is the hereditament, that is the particular area of property upon which an occupier is taxed. The tax (rates and additional rate for the BID) is paid by the occupier, although if the property is vacant, (depending upon its type and the nature of the property) a proportion of the full tax may be paid by the owner. This paper does not consider in detail the various reliefs and exemptions that exist although, undoubtedly, their fairness may come to be considered if BID proposals develop.

Fundamental to understanding the regulations and to appreciating their lack of transparency as they are currently drafted, is to understand what a hereditament is.

Hereditament

Hereditament is defined in the draft Statutory Instrument as meaning:

> *Anything which is or is treated as being a hereditament by virtue of the provisions of or any provisions made under section 64 of the 1988 Act*[1] *including any hereditament to which regulation 6 of the Non-Domestic Rating (Miscellaneous Provisions) Regulations 1989*[2] *applies but otherwise excluding any hereditament to which regulations made under section 64(3)(b) of the 1988 Act apply*.

What is meant by a *hereditament* is of fundamental importance as it is the unit of property which is subject to non-domestic rating.[3]

Section 64(1) of the Local Government Finance Act 1988 to which the draft Statutory Instrument refers states:

> *A hereditament is anything which, by virtue of the definition of hereditament in section 115(1) of the [General Rate Act 1967], would have been a hereditament for the purposes of that Act had this Act not been passed.*

Following the evolution of hereditament back in time, as is required for comprehension by the draft Statutory Instrument, section 115(1) of the General Rate Act 1967 provided;

> *Hereditament means property which is or may become liable to a rate, being a unit of such property which is, or would fall to be, shown as a separate item in the valuation list.*

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[1] Being a reference to the Local Government Finance Act 1988.
[2] S.I. 1989/1060; as amended by S.I. 1993/616
[3] As noted by Potter LJ at paragraph 14 *Cinderella Rockerfellas Ltd v Rudd [2003] EWCA Civ 529*

There has been a substantial body of case law since the origin of rating in 1601[4] which supplements and provides detailed interpretation of existing legislation and developing alongside has been a range of Statutory provisions altering what and how something may be rated. A key example would be the rating of chattels. Originally they were rated, their rateability being abolished by the Poor Rate Exemption Act of 1840. Since that date the liability of the occupier has been limited to when a chattel is used, enjoyed with, and enhances the value of the land[5]. Thus, chattels themselves are not 'rateable'[6]. The interpretation of a hereditament within non-domestic rating is however very wide and can include public conveniences, advertising hoardings, mooring rights in addition to the more obvious shops, offices and industrial premises.

The 1988 Act has substantially altered rating. Lord Hoffman has stated recently, *the revolutionary change made by the 1988 Act was to convert non-domestic rates from a local tax into a central tax*[7].

The extent of rating given the wide interpretation of what is a hereditament provides one fundamental criticism of the draft Statutory Instrument as drawn. The explanation lies in the fact that the introductory note to the proposed BIDs legislation suggests that the additional rate for the BID will be levied on all non-domestic hereditaments, when this may not in fact be the case. It may be argued that this has the potential to bring about a result that is unreasonable or unfair[8].

All non-exempt, non-domestic hereditaments are rated, but under the 1988 Act they may appear on one of two rating lists. Sections 41 to 51 of the 1988 Act make provision for the local rating of non-domestic hereditaments i.e. those which are not included in a central list. Section 53 provides that the Secretary of

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[4] Poor Relief Act 1601
[5] Leading comment on the rateability of Chattels was provided by Lord Denning MR in *Field Place Caravan Park Ltd v Harding (Valuation Officer) [1966] 3 All ER 247 at 250.*
[6] As noted by Potter LJ at paragraph 21 *Cinderella Rockerfellas Ltd v Rudd [2003] EWCA Civ 529*
[7] Paragraph *43 R (on the application of Edison First Power Ltd) v Central Valuation Officer and another [2003] UKHL 20.*
[8] Following the broader interpretative assumption that Parliament should not bring about such legislation with this consequence, as reaffirmed by Lord Scott of Foscote at paragraph 139 in *R (on the application of Edison First Power Ltd) v Central Valuation Officer and another [2003] UKHL 20.*

State may prescribe hereditaments that are to be centrally rated. The Central Rating Lists Regulations 1994[9] contain the current designations which includes; for example PowerGen in respect of all its hereditaments '*wholly or mainly used for the purposes of the generation of electrical power*'[10]; and British Telecom designated in respect of its '*posts, wires, underground cables and ducts, telephone kiosks, towers, masts, switching equipment, or other equipment, or easements or wayleaves*'[11]. A hereditament is therefore considered against the central list first and if it is not prescribed to a central list it will be considered against the local list. A British Telecom office building or retail unit does not fall within the central list designation and it will therefore appear on the local list. The central list was created in order that money would be paid centrally and redistributed to local authorities, the aim being to avoid disputes about the local authority area in which a hereditament, normally recognised as being occupied by what used to be called statutory undertakers, was situated when in fact it may be in many. Although it is possible for defined elements of a central list hereditament to be situated within one area, as would be the case for a power station, the situation regarding rail tracks and pipelines, for example, is more complex.

The draft Statutory Instrument for BIDs specifically refers only to the local list and it does not include hereditaments on the central list explicitly. If only local list hereditaments are liable it cannot be the case that all hereditaments are subject to the levy. This is an omission that can be regarded as unreasonable for a number of reasons. The fundamental nature of the 1988 Act and what Parliament intended by its introduction is not reflected in the draft.

The definition of what is a hereditament is the same for both lists: it is merely that specified hereditaments occupied by designated persons are to be centrally valued, listed and rated as one. These central list hereditaments do not have specific rateable values applied to individual hereditaments; all hereditaments occupied by designated persons are shown in the list as a whole and their taxable values either specified or

[9] Central Rating List Regulations 1994, SI 1994/3121
[10] The Schedule to SI 1994/3121 Part 2 paragraph 1
[11] By reference to Regulation 5 and Part 5, paragraph 2 to the Schedule to SI 1994/3121 and Regulation 4(1) of the Non-Domestic Rating (Railways, Telecommunications and Canals) Regulations 1994, SI 1994/3123.

calculated according to a statutory formula. They are still hereditaments within the definition, and some will be located in areas covered by BIDs.

The definition of hereditament for the purposes of the draft Statutory Instrument as noted above excludes *any hereditament to which regulations made under section 64(3)(b) of the 1988 Act apply*[12].

Section 64(3)(b) of the 1988 Act states that anything which would (apart from the regulations) be more than one hereditament shall be treated as one hereditament. If this is aimed at excluding central list hereditaments from the proposal it does not seem an open way of so doing. Neither would it remove the fact that such hereditaments are hereditaments within the terms of the definition used, nor that their occupiers would potentially gain benefit from being within a BID area, and should therefore contribute.

The two lists are mutually exclusive - it is not possible for the same property to appear in both lists at the same time. Although it is possible for a hereditament to move from one list to another, this in itself has caused problems, as exemplified by the *Edison* case[13] in the House of Lords.

The Statutory Instrument proposes only to ballot and charge the occupiers of those hereditaments appearing on the local list. Those who have hereditaments, as defined under the definition being used within the Statutory Instrument, that appear on the central list, will neither be balloted nor charged. Not charging those designated occupiers within the central list when they have a qualifying hereditament as defined cannot be reasonable on those local list hereditaments that will be paying the totality of any supplement. The majority of designated central list occupiers are non public concerns and many compete in areas with those who are not designated on the central list. For example, the advertising on British Telecom telephone boxes for its directory enquiry service is effectively free, yet this service competes with others.

[12] Draft Regulations 1(2) commenting on the interpretation of hereditament.
[13] *R (on the application of Edison First Power Ltd) v Central Valuation Officer and another [2003] UKHL 20*

It may also be considered unreasonable not to ballot central list occupiers when at some point they may have a hereditament (being exactly the same in nature) that moves from the central list to the local list, as was the case in *Edison*.

Within the regulations, use is being made of a definition of 'hereditament' that is aimed at covering all rateable units. Yet percentage requirements for voting are only being drawn from the local list. Central list hereditaments are not individually described and their occupiers cannot vote. To vote in favour of a BID proposal it is proposed in the regulations that there needs to be both a majority of occupiers of rateable hereditaments by number and by 75% by rateable value. It does not seem reasonable to exclude central list ratepayers of their hereditaments from voting and from payment without expressly stating to others that this is happening. Although it does not seem reasonable to exclude them from the democratic process if they should pay, if they are not to pay, the proposals will not cover *all hereditaments*[14] as is stated, and some justification for this exemption provided.

Occupation

The nature of occupation presents a further fundamental problem to the success of the proposals.

Prior to 1966, only occupied property that was rated. Since that date, provisions have been made for certain unoccupied properties to be rated, with the rating liability placed upon the owner. It is one reason why keep trading clauses can appear in a lease to ensure that the tenants trade to the end of a lease, thereby giving the benefit of the initial concession relating to empty property rates to the landlords when the property reverts to them[15].

[14] As in the Introduction provided by the Consultation Paper on the Draft Business Improvement Districts (England) Regulations 2004.

[15] When a non-domestic property becomes empty it is generally the case that no rates are paid for the first three months, thereafter the rate is 50% of the occupied level. The benefit runs with the building and not the party charged. To complicate matters certain properties by use or designation (for example, industrial buildings, or Listed Buildings) are exempt from the payment of empty property rates.

There will in general be a provision in any lease to ensure that the tenant pays all rates and taxes due. This only relates to the term of the tenancy, although it is also common to find a tenant to be obligated to minimize, or at least not to increase, the rates and taxes during the term of the tenancy. It is therefore questionable whether tenant occupiers would be able to vote in favour of any proposal to increase a tax that could at some future time be paid by their landlord without being in breach of covenant. Those drafting leases on behalf of landlords may need to expressly address the matter in future.

It would be quite reasonable for a landlord to be hostile to certain BID proposals if the increase in the tax burden can be argued to reduce rents without bringing any value benefits. This argument would then be used against them when fixing a rent at rent review or in lease renewal negotiations.

Whilst a landlord may have reasons not to support the BID proposal, the same could also be true for a tenant occupier. If the result of the BID is so very successful as to dramatically improve the area in question, this can be expected to enhance both property capital and rental values. The tenant will in effect be contributing to an increase in the level of rent and rateable value (and therefore rates) in the future. Symes and Steel (2003) comment on the paradox, '*more customers mean property owners will charge higher rents and small businesses in particular can find themselves priced out of an area*'.

At present, there are no detailed provisions determined prior to any ballot to address clearly how occupied and unoccupied property is to be treated, in respect of both voting and payment. Given the complications and intricacies of Rating Law and the interrelationship with Landlord and Tenant Law, it may be that, if left to local BID bodies, some of them will devise proposals that may be subject to successful legal challenge. It may also be the case that they develop proposals that are counter productive for some of the reasons noted above.

Poorly thought out procedures and administration have been identified as causing problems with a number of BIDs, for example the Madision Avenue and NOHO BIDs in New York. The problem with implementation in such circumstances is explored by Berman (1997).

Are all hereditaments included in the rating lists?

At present, there is a duty on the valuation officer to maintain a correct local rating list[16], but occupation and rate liability is calculated on a daily basis. Few people question whether the list is accurate in the sense that no one generally challenges omissions from it, save for the local authority that may make a proposal if on notification the Valuation Office Agency (VOA) does not do so.

There are however a large number of structures and erections in many areas that probably ought to appear on the local rating list but do not. Many structures and erections tend to be placed by local authorities and include covered cycle parks and the like. These local authorities are also responsible for notifying the VOA of their presence. The absence of a relevant hereditament from the list may alter either an aspect of the voting mechanism as well as resulting in something that is unfairly exempt from both rates and the BID levy.

New hereditaments are entered into the rating list following completion and there may be splits, mergers and deletions of existing hereditaments. Such changes to the list, which can occur some time after the change has actually been made, are back dated and back rates can be collected up to the effective date. Yet all these changes may occur to alter the position at the actual date of a BID ballot. The almost inherent inaccuracy of a rating list at a particular point in time, which is corrected later and back dated, cannot be foreseen specifically at the date of a particular ballot. There is the possibility that the ballot result would have been altered had subsequent changes to the list taken effect on the effective date.

Voting

It will be found that in a range of BID areas local authorities occupy a significant number of hereditaments and control as landlord, a reasonable number by value. In addition to the local authority, major shopping

[16] This is expressly stated in the 1988 Act.

centre owners can be expected to control a large proportion of hereditament value within a given BID area. There may be a concern as to the transparency of the democratic process on the part of smaller independent occupiers, especially if a voting turnout is low. These problems and concerns have been identified by Berman (1997) to be very real in the American experience.

In addition there is the problem of voting rights given to owners of unoccupied or exempt property, to those ratepayers benefiting from a concession or subject to transitional relief. The regime of rating in England is far more complex than the base position in America, or Canada which saw the first BID. Lengthy adversarial lawsuits have occurred in America and are commented upon by Symes and Steel (2003) and unless the voting position in England is transparent and clear lawsuits may follow in this jurisdiction.

Charities

The draft Statutory Instrument centres on the concept of the hereditament as a basis for a levy based on existing rating principles. The aim is to increase funding for a defined area for a defined purpose, or a range of purposes. At present not all occupiers bear an equal proportion of tax. Charities for example only pay a maximum of 20% of the occupied rates of others and may apply to the local authority for discretionary relief for the rest. The question is therefore raised in equity, is it fair that Charities should have the same voting rights as someone who will pay the full rate levy. Whilst if the levy is a percentage of rateable value rather than rates paid, Charities will see a greater increase in actual burden in percentage terms.

It may also be reasonable to ask a further question namely, should a local authority with a BID area operate discretionary relief on the remaining 20% of rates for Charities within this area? If they receive the full discretionary relief, they will be benefiting entirely from the supplementary contributions of others. To be fair and transparent, when any bid vote is taking place, the position of these bodies should be clearly identified.

To complete the consideration it would be appropriate to reflect adequately upon those buildings in a BID area that are exempt from rating altogether, and this would include derelict buildings and property used for religious worship. If they are to benefit from a BID proposal all interested parties should be made aware.

BID Area

It seems likely that certain central list hereditaments will fall wholly within a BID area and could be identified as such. Other central list items will cross a BID area boundary, for example, railway lines. This point will have considerable relevance if the definition of hereditament as appears to be the case, includes those items on the central list. To achieve its stated aim the BID area would need to be defined by specific reference to all rateable and non-rateable hereditaments irrespective of the list in which they may (or may not) appear.

American BIDs have on occasions given residents a vote for a small contribution, often one dollar, leading to complaints from businesses about the residents' voting strength. When residents have had no vote they have complained of 'taxation without representation'. The proposals for England do not propose to levy an additional sum on residents[17]. The residents will also not have the right to vote although the money raised from a BID will be spent in the BID area and this may benefit residents living within the area. Already in the proposed BID pilots for England we have seen in their development manipulation of the BID areas to include commercial hereditaments to be levied, and to exclude residential areas, which will benefit but not be levied. At least one Town Centre Manager drawing up the boundary for a BID pilot area has sought to include as many commercial hereditaments as possible; these will be levied if the BID is successful, thus raising more money. This is entirely reasonable from the Town Centre Manager's perspective. Residential units will not be levied therefore incorporating them offers no advantage to the BID area. We may see BID areas being driven by tax base (use) rather than being created by reference to local history or need, the regulations certainly encourage this.

[17] The only residents that will be charged are those in live-work units in a BID area where that part of their accommodation that attracts the non-domestic rate will be levied. Thus, the Council Tax is unaffected by the additional levy.

In America it is recognised that the success of a BID area has led to pressure for the improvement of an adjacent area, often by the creation of a new BID, Mitchell (1999). This is part of the competitive pressure arising from small BID areas. The proposals for England have tended to be geographically large, often entire city centres or a substantial part thereof, for example Liverpool and Peterborough. The positive pressure through competition in BID area status in England may only be created in those central London BID areas that are geographically smaller. There may be a neglect and exclusion of those areas left outside a BID area.

Timing

The proposals envisage the BID pilots being developed with effect from 1 April 2005. This date is also the date of the implementation of the next rating revaluation. Many hereditaments will alter in rateable value between the date of the last revaluation, which took effect from April 2000 and this. Clarity would be required as to the rateable value to be used for any BID proposal. To use 2000 list rateable values will give rise to complaints of relative accuracy between hereditaments; those values are likely to have altered significantly over the five year period since the last revaluation (being the reason for the revaluation). To use the proposed values as at 1 April 2005, which have recently been notified, means that the implementation would also be based on rateable values many of which will be subject to appeal. There appears to be little research in any proposed BID area of the likely alteration in rateable values between the 2000 and 2005 lists. Rateable values are not the same as rates paid but they provide the headline figure to which many occupiers relate. If they are to increase there may well be less of an appetite for voting in favour of proposals. If an increase in rateable values and rates paid occurs between the respective lists there will be greater pressure on an occupier wishing to minimise costs to vote against a supplementary increase.

The purpose of BID proposals

This paper has focused on the proposals for BIDs in England. There has been little discussion of what they are designed to achieve. In America and Canada what a BID spends its money on is defined by the BID body. The most common areas of spending are security staff, street lighting, street cleaning and street furniture and decoration (Symes and Steel, 2003). An American BID may also be much more; the San Diego BID incorporates energy efficiency, whilst The Bryant Square BID in New York has taken over partial responsibility for the funding and management of the local park (Symes and Steel, 2003).

The problems of Downtown North America in competing with out of town malls, the lack of parking, the aggressive begging and crime provided the spur for a voluntary initiative to compete (Symes and Steel, 2003). The proposals for England vary within much tighter limits between the proposed BID areas. They again have a focus on security and cleanliness, although some like Bedford propose wardens to greet people and direct them to eateries. This function may result in sector bias and may serve to work better for visitors than locals. The BID proposals themselves may benefit certain occupiers over others although in general it would seem that retailers have the most to gain. BIDs are a 'place marketing scheme' and those benefiting from 'place' may benefit from a BID. Symes and Steel (2003) comment that; *despite the high minded claims of many BID managers, BIDs are in essence simply localised attempts at 'place marketing'*. Those more neutral to place like office or industrial occupiers may not benefit and the proposals may be divisive amongst occupiers. In England there will be compulsion to pay the BID levy; however the origins of the American levy are voluntary.

Conclusions

The rating system in England is having grafted upon it an American BID model to which it is ill-suited. The American model is owner based whilst that proposed for England centres on occupiers. These occupiers may be voting for an area improvement that leads to an increase in the value of their hereditaments and therefore the rent that they may be required to pay. Would it not be better to levy the out of town occupiers and use the levy to strengthen town centres?

The wording of the proposed regulations is inconsistent with the commitment to levy the increased tax on all non-domestic ratepayers. Those ratepayers appearing on the central list have been omitted from the voting process and the levy in a manner that is not transparent or justified. This may be seen as unreasonable by those others being asked to vote and pay the levy, whilst those on the central list that subsequently move to the local list may complain that they had no say in the matter.

The voting and taxation provisions are not defined and transparent in connection with those paying less than full rates. The proposals do not adequately address those buildings currently exempt from rates in a BID area that will benefit from the proposals without being taxed at all. The proposals do not address an equitable treatment or transparency in voter knowledge of those benefiting from empty property relief, charitable status, discretionary relief, or transitional relief.

The regulations do not appear to recognise the Landlord and Tenant relationship and how it may develop to influence the success of a BID scheme that centres on occupiers rather than owners. The fundamental change to rating brought about by the 1988 Act appears not to have been recognised. The proposals appear to regard rating still as a local tax. The regulations do not adequately address *the revolutionary change made by the 1988 Act [which] was to convert non-domestic rates from a local tax into a central tax,* quoting Lord Hoffman in *Edison*[18].

The regulations lack clarity as to what rating list the figures are to be taken from given the proposed introduction of initial BIDs at the same time as a new rating list. The proposals also do not appear to recognise that the rating list is often subsequently altered or appealed and back dated to the relevant date. These subsequent changes may have affected the outcome of an earlier vote.

The prescriptive nature of the regulations cannot be adapted to 'microfit' local conditions. Symes and Steel (2003) report the great strength of the BID system in America being that local businesses can tax themselves a little or a lot, monthly or annually, under various plans, and spend money to their priorities.

That great strength is not present in the proposals for England. What is present are a lot of areas that may give rise to successful legal challenge and claims of unfairness or lack of transparency.

Martin Blackwell BSc(Hons) FRICS

Managing Director of Blackwell Consulting Limited.

Senior Lecturer in commercial real estate and property valuation, Department of Property and Construction, School of Architecture and the Built Environment, University of Westminster, 35 Marylebone Road, London, NW1 5LS.

[18] At paragraph 43 *R (on the application of Edison First Power Ltd) v Central Valuation Officer and another [2003] UKHL 20*.

Bibliography

Statutes

General Rate Act 1967

Local Government Finance Act 1988

Poor Rate Exemption Act 1840

Poor Relief Act 1601

Statutory Instruments

Central Rating List Regulations 1994, SI 1994/3121

Consultation Paper on Draft Business Improvement Districts (England) Regulations 2004

Non-Domestic Rating (Railways, Telecommunications and Canals) Regulations 1994, SI 1994/3123.

SI 1989/1060 as amended by SI 1993/616

Cases

Cinderella Rockerfellas Ltd v Rudd [2003] EWCA Civ 529

Field Place Caravan Park Ltd v Harding (Valuation Officer) [1966] 3 All ER 247 at 250.

R (on the application of Edison First Power Ltd) v Central Valuation Officer and another [2003] UKHL 20

References

BERMAN H (1997), *Managing the Micropolis: Proposals to Strengthen Business Improvement District Performance and Accountability*, New York, Council of the City of New York.

LEVY PR (2001), *Paying for the public life*, Economic Development Quarterly, 2001, Vol. 15, No 2, pp. 124-131.

MITCHELL J (1999), *Business Improvement Districts and Innovative Service Delivery*, New York, Pricewaterhouse Coopers.

MITCHELL J (2001), *Business Improvement Districts and the 'New' Revitalization of Downtown*, Economic Development Quarterly, 2001, Vol. 15, No. 2, pp 115-123.

SYMES M and STEEL (2003), *Lessons from America: The role of Business Improvement Districts as an agent of urban regeneration*, Town Planning Review, 2003, Vol. 74, No. 3, pp 301-313.